Petition

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No. ——

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

YELLOW FORWARDING COMPANY,
Petitioner,

v.

ATLANTIC CONTAINER LINE, *et al.*,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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QUESTION PRESENTED

Could the Federal Maritime Commission immunize an antitrust conspiracy that was never presented to or considered by the Commission?[1]

[1] The Petitioner, Yellow Forwarding Company, is a wholly-owned subsidiary of Yellow Freight, Inc. The respondents are Atlantic Container Line, Dart Containerline Limited. Hapag-Lloyd Aktiengesellschaft, Sea-Land Services, Inc., and United States Lines, Inc. Charged as a co-conspirator but not made a defendant is the International Longshoremen's Union.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

Petitioner, Yellow Forwarding Company, respectfully prays that a writ of certiorari issue to review and reverse a judgment and opinion of the United States Court of Appeals for the Eighth Circuit.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Missouri is reported at 498 F.Supp. 105 (1980). The opinion of the United States Court of Appeals for the Eighth Circuit, decided December 21, 1981, is reproduced at pp. 1a-11a of the Appendix to this Petition.

JURISDICTION

The judgment of the Court of Appeals for the Eighth Circuit was entered on December 21, 1981. This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

Sherman Act

Sec. 1. Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. . . .

Clayton Act

Sec. 4. Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . .

Clayton Act

(as amended by the
Hart-Scott-Rodino Antitrust Improvements Act of 1976

Pub.L.No. 94-435, September 30, 1976)

Sec. 16. Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief, in any court of the United States having juris-

diction over the parties, against threatened loss or damage by a violation of the antitrust laws, including sections 13, 14, 18, and 19 of this title, when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage is granted by courts of equity, under the rules governing such proceedings, and upon execution of proper bond against damages for an injunction improvidently granted and a showing that the danger of irreparable loss or damage is immediate, a preliminary injunction may issue: *Provided,* That nothing herein contained shall be construed to entitle any person, firm, corporation, or association, except the United States, to bring suit in equity for injunctive relief against any common carrier subject to the provisions of the Act to regulate commerce, approved February fourth, eighteen hundred and eighty-seven, in respect of any matter subject to the regulation, supervision, or other jurisdiction of the Interstate Commerce Commission. *in any action under this section in which the plaintiff substantially prevails, the court shall award the cost of suit, including a reasonable attorney's fee, to such plaintiff.*

Shipping Act of 1916

(as amended by the
Maritime Labor Agreements Act of 1980

Pub.L.No. 96-325, August 8, 1980)

Sec. 15. Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this

chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic; allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements[;], *but does not include maritime labor agreements or any provisions of such agreements, unless such provisions provide for an assessment agreement described in the fifth paragraph of this section.*

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations. No such agreement shall be approved, nor shall continued approval be permitted for any agreement (1) between carriers not members of the same conference or conferences of carriers serving dif-

ferent trades that would otherwise be naturally competitive, unless in the case of agreements between each conference, each carrier, or in the case of agreements between conferences, each conference, retains the right of independent action, or (2) in respect to any conference agreement, which fails to provide reasonable and equal terms and conditions for admission and readmission to conference membership of other qualified carriers in the trade, or fails to provide that any member may withdraw from membership upon reasonable notice without penalty for such withdrawal.

The Commission shall disapprove any such agreement, after notice and hearing, on a finding of inadequate policing of the obligations under it, or of failure or refusal to adopt and maintain reasonable procedures for promptly and fairly hearing and considering shippers' requests and complaints.

Any agreement and any modification or cancellation of any agreement not approved, or disapproved, by the Commission shall be unlawful, and agreements, modifications, and cancellations shall be lawful only when and as long as approved by the Commission; before approval or after disapproval it shall be unlawful to carry out in whole or in part, directly or indirectly, any such agreement, modification, or cancellation; except that tariff rates, fares, and charges, and classifications, rules, and regulations explanatory thereof (including changes in special rates and charges covered by section 813a of this title which do not involve a change in the spread between such rates and charges and the rates and charges applicable to noncontract shippers) agreed upon by approved conferences, and changes and amendments thereto, if other-

wise in accordance with law, shall be permitted to take effect without prior approval upon compliance with the publication and filing requirements of section 817 (b) of this title and with the provisions of any regulations the Commission may adopt.

Assessment agreements, whether part of a collective bargaining agreement or negotiated separately, to the extent they provide for the funding of collectively bargained fringe benefit obligations on other than a uniform man-hour basis, regardless of the cargo handled or type of vessel or equipment utilized shall be deemed approved upon filing with the Commission. The Commission shall thereafter, upon complaint filed within 2 years of the date of filing of the agreement, disapprove, cancel, or modify any such agreement or charge or assessment pursuant thereto, that it finds, after notice and hearing, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, or to operate to the detriment of the commerce of the United States. The Commission shall issue its final decision in any such complaint proceeding within 1 year of the date of filing of the complaint. To the extent that any assessment or charge is found, in such a complaint proceeding, to be unjustly discriminatory or unfair as between carriers, shippers, or ports, the Commission shall remedy the filing of the complaint and the final decision by means of assessment adjustments. Such adjustments shall be implemented by prospective credits or debits to future assessments or charges, except in the case of a complainant who has ceased activities subject to the assessment or charge, in which case reparation may be awarded. To the extent that any provision of this paragraph conflicts with the language of section 821 of this title or any other section of this chapter, or of the

Intercoastal Shipping Act, 1933, the provisions of this paragraph shall control in any matter involving assessment agreements described herein.

Every agreement, modification, or cancellation lawful under this section, or permitted under section 813a of this title, shall be excepted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

. . .

STATEMENT OF THE CASE

1. The Complaint

Petitioner, Yellow Forwarding Co. (hereafter "Yellow"), is a St. Louis-based Interstate Commerce Commission-licensed freight forwarder that is also licensed by the Federal Maritime Commission (hereafter "the Commission") as a Non-Vessel Operating common carrier ("NVO"). Yellow assembles freight into shipping containers at Midwestern points for land transportation to Atlantic Coast ports, and ocean movement beyond to European destinations. The process by which it assembles freight into a single shipping container is called "containerization." In handling containerized overseas shipments, it makes all arrangements in behalf of the shippers for both land and ocean transportation. As an NVO, Yellow competes with other NVOs, as well as with vessel operating ocean carriers (hereafter "ocean carriers") for transatlantic shipments.

Respondents are all ocean carriers engaged in the transatlantic trade. All employ members of the International Longshoremen's Association (hereafter "the Union") to load their ships. Union members have never

done any of the work performed by Yellow's employees. The Respondent ocean carriers pay NVOs such as Yellow "consolidation allowances" for containerizing shipments tendered to Respondents by NVOs for ocean transportation.

The Complaint charged that Respondents had conspired with the Union to impose on Yellow a uniformly low and inadequate compensation for containerization performed by Yellow in the Middle West. The injurious purpose alleged was a secondary boycott in violation of the Labor Management Relations Act, aimed at transferring these containerization functions to Atlantic Ocean ports where they could be performed by Union members. This conspiracy was alleged to violate § 1 of the Sherman Act. The relief sought was injunctive relief against this conspiracy and treble damages for past injury.

The Complaint did not charge any violation of the Shipping Act. The Commission is admittedly authorized by that Act to approve such agreements as ocean carrier conference members choose to file. Respondents characterized the containerizing compensation challenged in the Complaint below as a consolidation allowance which was stated in the Respondents' rate agreements as a discount from the filed ocean tariffs. The courts below concluded that Respondents' actions in furtherance of the conspiracy alleged had previously been immunized from antitrust challenge by the Commission. The immunizing action was deemed to have resulted from prior Commission approval of the agreement among ocean carriers considered in its Docket No. 76-35, Cancellation of Consolidation Allowance Rule (20 F.M.C. 858 (1978)). The legality of the agreement considered in that proceeding was not chal-

lenged by Yellow either before the Commission or in the District Court. The only immunity question raised by the Complaint below was whether the Commission's order in No. 76-35 immunized the conspiracy between the ocean carriers and the Union to transfer containerization functions from the middle west to East Coast ports by a secondary boycott.

2. The Maritime Commission Proceedings

Docket No. 76-35, the Commission proceeding on which the courts below relied, arose from a 1975 attempt by the ocean carriers concertedly to abolish the existing compensation theretofore provided to NVOs for their consolidation services. That compensation had been established by the ocean carrier agreement referred to above. In Docket No. 76-35, Yellow and other NVOs protested the proposed reduction of their consolidation compensation to zero. The Commission took no evidence in that case and treated the proceeding as presenting only questions of law. (20 F.M.C. 858, 859, at n. 3 (1978)).

The first question the Commission addressed in Docket No. 76-35 was whether the ocean carriers' agreement to pay uniform consolidation allowance had previously been approved. Some protestants argued that no such approval had been given. Yellow and the ocean carriers argues that it had been. The Commission found that it had previously been approved. Yellow and the other prevailing parties could not, of course, appeal from this ruling.[2]

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[2] Yellow had not even been a party to the prior proceeding in which approval was found, *nunc pro tunc*, to have been granted.

The second question considered was whether such approval also implied approval of the abolition of compensation allowances without the necessity for the filing of a further agreement. The ocean carriers argued that immunization granted by that approval of a system of allowances implicitly gave them the right to eliminate the allowances. Yellow and other parties argued that the ocean carriers could not do so. The Commission agreed with Yellow and the other protestants. This decision was appealable only by the ocean carriers.

Instead of appealing, the ocean carriers filed a new agreement to abolish the existing compensation. This proposal was again protested and resulted in the abortive evidentiary hearing referred to in footnote 8 of the Court of Appeals opinion. (Appendix, p. 5a.) That agreement was withdrawn by the ocean carriers after an adverse Administrative Law Judge's decision, and was never approved by the Commission.

3. The Court of Appeals Decision

The Court of Appeals, which affirmed a summary dismissal by the District Court, held that in order for the antitrust relief sought by the Complaint to be granted:

> "the district court would have had to find that the uniform allowances had not been established pursuant to an approved conference agreement and thus were not immune from the antitrust laws. *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213, 216 (1966). So considered, it is clear that appellant's complaint is an improper attempt to seek collateral review of the merits of the Commission's decision in the district court.

"Appellant could have raised its arguments before the commission and sought timely review in the court of appeals. It chose not to do so. It cannot now force collateral redetermination of the legality of the uniform allowances in a different and inappropriate forum. *Port of Boston Marine Terminal Ass'n.* v. *Rederiaktiebolaget Transatlantic, supra,* 400 U.S. at 72, *citing United States* v. *Western Pacific R.R.,* 352 U.S. 59, 69 (1956)" Appendix, p. 9a (footnote omitted).

ARGUMENT

The above-quoted language says, in effect, that the Shipping Act of 1916 has completely displaced the antitrust laws where the shipping industry is concerned. We shall show that this holding is contrary to this Court's decisions; and that the Shipping Act grants immunity for anti-competitive conduct only where such conduct is explicitly described and found to serve a Shipping Act purpose.

In holding that the Commission's decision in Docket No. 76-35 had immunized the conspiracy alleged below, the Court of Appeals misconstrued this Court's decision in *Carnation Co.* v. *Pacific Westbound Conference,* 383 U.S. 213 (1966). This Court did not hold in *Carnation* that an antitrust plaintiff would have to establish a violation of the Shipping Act to prevail against shipping conference members. *Carnation* held only that an antitrust suit, based upon a specific conference rate modification that allegedly violated the Shipping Act, could not be defeated by a claim that the Act authorized shipowners to establish any conference rate they pleased once their conference rate agreement had won Commission approval. This Court said there that

the Act gave no such implied approval to modifications of conference rate-making. The Court further held that where a specific rate modification was alleged to violate the Act, the Commission must make a specific, informed judgment in a further proceeding that the modified rate would meet the public interest standard of the Act.

There is no suggestion in *Carnation* that Commission approval of a conference rate agreement immunizes the agreement, or the agreed rate, from an antitrust attack based upon conduct never presented to, or considered by, the Commission. This Court's *Carnation* opinion affirmed the need for an informed public interest judgment by the Commission as to the impact of specific anti-competitive effects as a condition of antitrust immunity. The Commission thus must find that the immunized conduct is needed to accomplish some objective of the Shipping Act; 383 U.S. 213, 218.

The Commission did not hear evidence in Docket No. 76-35, and hence did not consider and could not have considered, the anti-competitive effects alleged in Yellow's antitrust Complaint. The Commission therefore could not find that these adverse effects must be tolerated to achieve some purpose of the Shipping Act. All that the Commission could consider was whether the agreement before it authorizing the allowance in question was lawful under the Shipping Act.

The Court of Appeals' suggestion that Yellow could have raised its antitrust arguments before the Commission in Docket No. 76-35 borders on the absurd. Yellow's antitrust arguments depend for validity on factual proof. No evidence was heard in that proceeding. Yellow obviously could not argue that the Commis-

sion should find as a matter of law that the agreement then before the Commission was part of a Union boycott. No agreement of any kind with the Union was before the Commission.[3]

The Commission has undoubted jurisdiction to immunize any ocean carrier's agreement needed to enforce the Shipping Act. The ocean carriers' agreement in Docket No. 76-35 was presumed in the Complaint below to be a properly immunized, lawful agreement. It was not this agreement but a wider conspiracy embracing the Union that was alleged to violate the Sherman Act. It was that conspiracy's illegal purpose, a secondary boycott, that allegedly made the conspiracy illegal; not the fact that the shipowners had acted collectively to establish uniform consolidation compensation.

Our Complaint sought only antitrust relief, none of which could have been granted by the Commission. We made no effort to present this complaint to the Commission because the Commission has only a limited antitrust jurisdiction. It can consider only claims of antitrust law violation that are produced by agreements submitted to the Commission for approval.

There is, indeed, no administrative agency in the United States that is authorized to hear evidence of

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[3] The Commission's reference to "unapproved agreements," quoted at Appendix, p. 4a, may have given the impression that the agreement to impose a uniform consolidation allowance was claimed to be an unfiled agreement. That agreement was in fact spelled out in the ocean carriers' filed tariffs. The parties who claimed that this allowance agreement was unapproved based their argument on the claim that these allowances could not be included in a rate agreement. 20 F.M.C. 858, at 861-863 (1978).

an antitrust conspiracy and immunize it, as an original matter. No United States Court has previously endowed any agency with such sweeping power.

The Defendants in this case were all defendants in the treble damage class action (In re Ocean Shipping Antitrust Litigation, MDL No. 395), arising out of the Government's successful prosecution of shipowners for a price fixing conspiracy. The private action has just been settled by the payment of $50 million, yet at no point did the Government or the private plaintiffs submit their claims to the Maritime Commission.

The Court below failed to see that the Complaint was based upon lawful conduct directed toward an illegal end. This theory of antitrust liability is known as the "lawful act doctrine." The lawful act doctrine case in this Court that seems most analogous to this case is *Allen Bradley Co.* v. *Electrical Workers Union,* 325 U.S. 797 (1945).

The Court of Appeals' observation that *Allen Bradley* involved no statutory immunity is pointless. The case held that agreements which were then valid labor union agreements could not impliedly immunize an antitrust law violation involved in those agreements. Because they were shown to have an unstated purpose to injure competitors of the employer parties to the agreements, by attempting to shift to New York work normally performed elsewhere, as in this case, they were held subject to the antitrust laws.

The Shipping Act provides statutory immunity only where the Commission consciously decides that specific anti-competitive effects are outweighed by equally specific public interest objectives of the Shipping Act. *Allen Bradley* held that mere legality for Labor Act

purposes does not justify an implied finding of general antitrust immunity. The Eighth Circuit Court of Appeals, on the other hand, has held that a mere finding of Shipping Act legality for a shipowner's agreement implies antitrust immunity against any use of the agreement to promote anti-competitive purposes not presented to or considered by the Commission.

We respectfully submit that this doctrine of totally blind immunity grants is so subversive of rational public policy that correction should be provided by this Court. Any immunizing agency has to know what it is immunizing in order to make a rational judgment as to where the public interest lies.

The Eighth Circuit Court of Appeals' lack of understanding of the need for knowledgeable Commission immunizing action is well illustrated by its mistaken reliance on *Interpool Ltd.* v. *FMC,* 663 F.2d 142 (D.C. Cir. 1980) at Appendix, p. 8a. That case explicitly rejected the argument implied in the opinion below that the Commission may immunize unconsciously. In *Interpool,* the case was remanded to the Commission with directions to consider a specific anti-competitive effect that the Commission had not considered in its prior approval of the agreement producing the anti-competitive effect.

The Court of Appeals' talk about "collateral redetermination" (Appendix, p. 9a) of something never determined is irrelevant. This Court did not hold in *Port of Boston Marine Terminal Ass'n.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970) or any other case that a contention not made to the Commission could not be made in another forum. The case held only that if a contention is made to and rejected by

the Commission, the Commission's judgment may not be collaterally attacked.

We respectfully submit that the Eighth Circuit's misinterpretation of this Court's decisions and its contradiction of the Court of Appeals' holding in *Interpool* are such flagrant errors that a plenary hearing is not necessary to correct them. The Eighth Circuit's holding should be summarily reversed with directions to remand the case for trial in the District Court.

Respectfully submitted,

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Appendix

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 80-1945

YELLOW FORWARDING CO. d/b/a YELLOW FREIGHT INTERNATIONAL, *Appellant*,

v.

ATLANTIC CONTAINER LINE; DART CONTAINERLINE COMPANY LIMITED; HAPAG-LLOYD AKTIENGESELLSCHAFT; SEA-LAND SERVICE, INC.; and UNITED STATES LINES, INC., *Appellees*.

Appeal from the United States District Court for the Eastern District of Missouri

Submitted: September 17, 1981

Filed: December 21, 1981

Before STEPHENSON and MCMILLIAN, Circuit Judges, and HANSON,* Senior District Judge.

MCMILLIAN, Circuit Judge.

Yellow Forwarding Company appeals from a summary judgment entered in the District Court for the Eastern District of Missouri[1] pursuant to Fed. R. Civ. P. 12(b), dismissing its complaint seeking monetary and injunctive relief against appellee ocean carriers on the basis of alleged violations of the Sherman Act, 15 U.S.C. § 1, and the Labor Management Relations Act, 29 U.S.C. §§ 158(b) and (e).

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* The Honorable William C. Hanson, United States Senior District Judge for the Northern and Southern Districts of Iowa, sitting by designation.

[1] The Honorable Edward L. Filippine, United States District Judge for the Eastern District of Missouri.

For reversal appellant argues that the district court erred (1) in finding that the Federal Maritime Commission's (Commission) approval of appellees' conference agreement required the dismissal of its complaint, and (2) in finding that the Commission has the authority to immunize the conspiracy and secondary boycott alleged in appellant's complaint. For the reasons discussed below, we affirm.

Appellant is a surface freight forwarder and a non-vessel operating common carrier (NVO). It consolidates, for midwestern shippers, less-than-container loads into single containers for shipment to ocean ports and beyond. Appellant employs the services of ocean carriers to carry container shipments across the Atlantic.[2]

Appellees operate ocean vessels for trans-Atlantic shipments of containerized freight and employ members of the International Longshoremen's Association (Union) to load their ships. Appellees are subject to the jurisdiction of the Commission pursuant to the Shipping Act, 46 U.S.C. § 801 *et seq.* Under § 15 of the Shipping Act,[3] 46 U.S.C. § 814,

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[2] NVOs earn revenues by obtaining the benefit of the lower full-container load rate of the ocean carriers while charging the underlying shipper according to a tariff structure intended to result in a profit to the NVO.

[3] Section 15 provides in relevant part:

> Every common carrier by water, or other person subject to this chapter, shall file immediately with the Commission a true copy, or, if oral, a true and complete memorandum, of every agreement with another such carrier or other person subject to this chapter, or modification or cancellation thereof, to which it may be a party or conform in whole or in part, fixing or regulating transportation rates or fares; giving or receiving special rates, accommodations, or other special privileges or advantages; controlling, regulating, preventing, or destroying competition; pooling or apportioning earnings, losses, or traffic;

ocean carriers may organize ratemaking conferences through which the conference members may jointly establish the rates to be observed by the member carriers in the particular trade covered by the agreement. Conference agreements must be filed with and approved by the Commission.[4] Agreements approved by the Commission and activities conducted pursuant to approved agreements are exempt from the antitrust laws.[5]

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allotting ports or restricting or otherwise regulating the number and character of sailings between ports; limiting or regulating in any way the volume or character of freight or passenger traffic to be carried; or in any manner providing for an exclusive, preferential, or cooperative working arrangement. The term "agreement" in this section includes understandings, conferences, and other arrangements. . . .

The Commission shall by order, after notice and hearing, disapprove, cancel or modify any agreement, or any modification or cancellation thereof, whether or not previously approved by it, that it finds to be unjustly discriminatory or unfair as between carriers, shippers, exporters, importers, or ports, or between exporters from the United States and their foreign competitors, or to operate to the detriment of the commerce of the United States, or to be contrary to the public interest, or to be in violation of this chapter, and shall approve all other agreements, modifications, or cancellations.

[4] 46 U.S.C. § 814; *see* note 3 *supra*. The only exception to this requirement is for types or classes of agreements which the Commission, after appropriate administrative proceedings, determines are of such a *de minimus* or routine character as not to require a formal filing. *See Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261, 276 (1968).

[5] Section 15 provides in relevant part:

Every agreement, modification, or cancellation lawful under this section or permitted under section 813a of this title, shall be exempted from the provisions of sections 1 to 11 and 15 of Title 15, and amendments and Acts supplementary thereto.

Appellees are members of the North Atlantic Shipping Conference. Several years ago appellees agreed to establish and maintain uniform consolidation allowances.[6] The conference agreements were filed with the Commission as part of appellees' ocean tariffs.

Subsequently, appellees attempted to eliminate the allowances by filing tariff revisions to that effect with the Commission. In December, 1975, in response to complaints from NVOs, freight forwarders, and consolidators, the Commission issued an Order to Show Cause directing appellees to show:

> [W]hy the Commission should not find that any concerted action of Respondents [appellees] with regard to consolidation allowances are actions which implement unfiled, unapproved agreements in violation of section 15.
>
> . . . .
>
> [W]hy, even if the concerted actions are pursuant to agreements approved by the Commission under section 15 of the Shipping Act, 1916, the Commission should not find such agreements contrary to the public interest which should be disapproved or modified.

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[6] It is not clear from the record exactly how long the uniform rules have been on file with the Commission. Appellants admit that they had been filed for at least six years at the time of filing its complaint in district court. *Yellow Forwarding v. Atlantic Container*, No. 79-1003 C (3) (E.D. Mo. Sept. 30, 1980) (Complaint at 3).

The allowances consist of discounts from an ocean carrier's normal full containerload rates. They are paid to NVOs who tender for shipment fully-loaded containers holding a specified mixture of cargo, including cargo owned by a prescribed minimum number of different underlying shippers.

Docket No. 76-35, *Cancellation of Consolidation Allowance Rule* (1978) (Appendix A at 3-4).[7] In that proceeding appellant and other NVOs participated as intervenors and all five of the instant appellees were respondents.

The Commission found that, although the consolidation allowances did not constitute routine ratemaking, appellees' "agreement as approved by this Commission permits them the authority to initiate and maintain a system of consolidation allowances." Appendix A at 17. However, the Commission found that such authority did not extend to cancellation or elimination of the allowances and that any attempt at cancellation would require separate approval under § 15.[8] *Id.* at 18. The Commission further determined that the implementation and maintenance of the consolidation allowance system was in the public interest because it fostered the growth of the consolidation business. *Id.* at 19-20. No party to Docket No. 76-35 sought judicial review of the Commission's decision, although such review was available pursuant to 28 U.S.C. § 2342.

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[7] Copies of the Commission dockets were attached to the designated record as appendixes. The dockets will be cited throughout this opinion by a reference to the Commission docket number and appendix page number.

[8] While Docket No. 76-35 was pending several ocean carriers, including four of the instant appellees, filed Conference Agreement No. 10294, under which they refused to pay consolidation allowances to off-pier NVOs while continuing to pay allowances to on-pier NVOs for similar work. The Commission instituted Docket No. 77-23, Appendix E, to determine the lawfulness of the agreement under § 15. The administrative law judge found that the proposed agreement violated the Shipping Act and the carriers subsequently cancelled the agreement and withdrew their request for its approval. Docket No. 77-23, Appendix E at 97. That decision was filed after appellant filed the instant complaint in district court.

Subsequently, appellant filed the present action in district court. Specifically, appellant alleged that appellees had conspired with each other and with the Union to violate § 1 of the Sherman Act by depriving appellant of its right to deal competitively with appellees. Appellant alleged that appellees carried out the conspiracy by both establishing and attempting to eliminate the consolidation allowance system without informing the Commission that the intended purpose of the uniform allowance rule was to transfer the consolidation business from the Midwest to the East Coast and that the effect of the rule was a secondary boycott of appellant which employed no members of the Union, in violation of the Labor Management Relations Act, 29 U.S.C. § 158(b), (e).[9]

Appellees filed motions to dismiss the complaint for failure to state a claim upon which relief could be granted. The district court granted the motions holding that the Commission's decision in Docket No. 76-35 conferred antitrust immunity on the consolidation allowances under § 15 of the Shipping Act because the Commission had found the allowances to be within the scope of appellees' approved conference agreements and in the public interest. *Yellow Forwarding Co. v. Atlantic Container Line,* No. 79-1003 C (3) (E.D. Mo. Sept. 30, 1980) (slip op. at 8). The district court also ruled that appellant, as a party to Docket No. 76-35, could not challenge that immunity by collaterally attacking the Commission decision in district court. *Id., citing Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970). The district court further held that the complaint failed to state a cause of action insofar as it alleged an agreement with the Union to obtain Commission approval to eliminate the allowance because that conduct was protected under the *Noerr-Pennington* doctrine. Slip op. at 10.

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[9] Appellant has not raised the issue of appellees' efforts to *eliminate* the uniform allowances. *See* note 8 *supra.*

On appeal appellant argues that the Commission's decision in Docket No. 76-35 did not immunize the conspiracy and secondary boycott alleged in its complaint because the nature, purpose and intended effect of the conspiracy were not revealed to the Commission. Therefore, appellant argues, the district court erred in relying on *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, supra,* 400 U.S. 62. Appellant does not challenge the Commission's approval of the fixing of consolidation allowances pursuant to a conference agreement. Alternatively, appellant argues that the Commission lacks jurisdiction under *Allen Bradley Co. v. Electrical Workers Union,* 325 U.S. 797 (1945), to immunize a conspiracy among appellees and the Union to injure the business of midwestern consolidators by a secondary boycott.

In response appellees argue that the uniform allowances are immunized from the antitrust laws by reason of the Commission's approval and that appellant is estopped from collaterally attacking the issues decided by the Commission in Docket No. 76-35.

We find appellant's arguments unpersuasive and affirm the district court's dismissal of appellant's complaint for lack of subject matter jurisdiction. Appellees' conference agreements are exempt from the federal antitrust laws by virtue of Commission approval pursuant to § 15 of the Shipping Act, 46 U.S.C. § 814, and appellant may not seek judicial review of the final orders of the Commission by filing an antitrust action in the district court.

First, appellant argues that the only issue litigated before the Commission in Docket No. 76-35 was whether appellees' "elimination [of the allowances] had been impliedly approved by the [Commission's] prior approval of their earlier ratemaking agreement."[10] However, the issues

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[10] Appellant's Brief at 15-16. Appellant raises an analogous argument when it states that application of the collateral estoppel doc-

set forth for investigation in that proceeding included whether "any concerted action of Respondents [appellees] with regard to consolidation allowances are actions which implement . . . unapproved agreements . . . in violation of section 15." Appendix A at 3. Therefore, the scope of the issue decided by the Commission included the legality of the establishment and maintenance, as well as the attempted elimination, of the uniform allowances.

Moreover, the Commission in Docket No. 76-35 specifically found that the establishment and maintenance of the allowances was in the "public interest." Appendix A at 19. In making such a finding, the Commission must consider the antitrust implications of the agreements submitted for approval. *E.g., FMC v. Pacific Maritime Ass'n,* 435 U.S. 40, 53 (1978); *FMC v. Seatrain Lines, Inc.,* 411 U.S. 726, 739 (1973); *FMC v. Aktiebolaget Svenska Amerika Linien,* 390 U.S. 238, 242-44 (1968). Further, when allegations are raised that a conference action results in a secondary boycott, the Commission is required to consider such allegations in determining whether the conduct is authorized under § 15. *Interpool, Ltd. v. FMC,* No. 79-1194 (D.C. Cir. Nov. 18, 1980).

---

trine is inappropriate as evidenced by the Commission's willingness to relitigate the issues decided in Docket No. 76-35 in the subsequent Docket No. 77-23. However, appellant's argument is misleading. Docket No. 76-35 decided that the uniform allowances were lawful because they were instituted pursuant to an approved agreement and therefore did not require a separate filing under § 15. However, Docket No. 76-35 also decided that attempts to reduce or eliminate the uniform allowances would require a separate filing and approval under § 15. Docket No. 77-23 was then instituted by appellees in an attempt to obtain Commission approval for the elimination of the allowances. The legality of the establishment and maintenance of the allowances was not relitigated in Docket No. 77-23. *See* note 8 *supra.*

Therefore, appellant's allegations as to the alleged purpose and intended effect of the agreement among the appellees and the Union as to the terms on which appellees would compensate it were clearly within the scope of the Commission's inquiry in Docket No. 76-35.

In addition we note that appellant seeks injunctive relief restraining appellees from enforcing the uniform allowances and monetary relief for damages incurred by reason of the establishment and maintenance of the uniform allowances. In order to grant such relief the district court would have had to find that the uniform allowances had not been established pursuant to an approved conference agreement and thus were not immune from the antitrust laws. *Carnation Co. v. Pacific Westbound Conference,* 383 U.S. 213, 216 (1966). So considered, it is clear that appellant's complaint is an improper attempt to seek collateral review of the merits of the Commission's decision in the district court.

Appellant could have raised its arguments before the Commission[11] and sought timely review in the court of appeals. It chose not to do so. It cannot now force collateral redetermination of the legality of the uniform allowances in a different and inappropriate forum. *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, supra,* 400 U.S. at 72, *citing United States v. Western Pacific R.R.,* 352 U.S. 59, 69 (1956).

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[11] Appellant's proffered argument to justify its failure to raise its arguments before the Commission is that it would have been inconsistent with its position in Docket No. 76-35 that the uniform allowances promoted competition in the consolidation trade. Appendix A at 10. However, we note that other intervenor-consolidators participating in Docket No. 76-35 argued that both the establishment and the attempts to eliminate the allowances violated § 15. *Id.* at 10-11.

Appellant next argues that the Commission lacks jurisdiction to immunize the alleged conspiracy from the antitrust laws. We disagree. Section 15 of the Shipping Act establishes the requirements for obtaining Commission approval of conference agreements. The section requires submission of all agreements that have the effect of "fixing or regulating transportation rates" or "controlling, regulating, preventing, or destroying competition."[12] After notice and hearing the Commission may cancel, disapprove or modify any agreement that is "unjustly discriminatory or unfair," would "operate to the detriment of the commerce of the United States," is contrary to the public interest, or is in violation of the Shipping Act.[13] Agreements approved by the Commission are exempt from the antitrust laws.[14] Therefore, the Shipping Act clearly contemplates that anticompetitive agreements will be executed and, if approved by the Commission, are permissible in the shipping industry. *See FMC v. Pacific Maritime Ass'n, supra,* 435 U.S. 40.

In addition, the Supreme Court has held that district courts do not have jurisdiction in antitrust suits to determine the substantive legality or propriety of conference agreements or rates; such issues are within the exclusive competence and primary jurisdiction of the Commission. *Far East Conference v. United States,* 342 U.S. 570 (1952); *United States Navigation Co. v. Conrad S.S. Co.,* 284 U.S. 474 (1932). Further, the courts of appeals have exclusive jurisdiction to "determine the validity of . . . such final orders of the Federal Maritime Commission." *Port of Boston Marine Terminal Ass'n v. Rederiaktiebolaget Transatlantic, supra,* 400 U.S. at 69, *citing* 28 U.S.C. § 2342;

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[12] 46 U.S.C. § 814; *see* note 3 *supra.*

[13] *Id.*

[14] *Id.*

Consolo v. FMC, 383 U.S. 607, 613 (1966); *Far East Conference v. United States, supra*, 342 U.S. at 577.

Appellant's reliance on *Allen Bradley Co. v. Electrical Workers Union, supra*, 325 U.S. 797, is misplaced. That case did not involve a regulatory statute which granted immunity from the antitrust laws for the conduct involved. Unlike an agreement among ocean carriers for which antitrust immunity may be conferred by Commission approval, no analogous statutory immunity is available to electrical equipment manufacturers such as those involved in *Allen Bradley*. *See FMC v. Pacific Maritime Ass'n, supra*, 435 U.S. at 61.

Accordingly, the judgment of the district court is affirmed.

A true copy.

ATTEST:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT

Appéndix

Supreme Court, U.S.
FILED
MAR 29 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1695

IN THE

Supreme Court of the United States

OCTOBER TERM, 1981

YELLOW FORWARDING COMPANY,
Petitioner,

v.

ATLANTIC CONTAINER LINE, *et al.*,
Respondents.

SUPPLEMENTAL APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1003 C (3)

YELLOW FORWARDING Co. d/b/a YELLOW FREIGHT INTERNATIONAL, *Plaintiff*,

v.

ATLANTIC CONTAINER LINE, DART CONTAINERLINE COMPANY LIMITED, HAPAG-LLOYD AKTIENGESELLSCHAFT, SEA-LAND SERVICE, INC., UNITED STATES LINES, INC., *Defendants.*

ORDER

(Filed September 30, 1980)

This matter is before the Court on the motion of defendants Atlantic Container Line, Dart Containerline Company Limited, Hapag-lloyd Aktiengesellschaft, and United States Lines, Inc., and on the motion of defendant Sea-Land Service, Inc., to dismiss the plaintiff's complaint. After consideration of the matter, including the matters outside the pleadings which have been submitted by the parties, and in accordance with the memorandum filed this day and incorporated herein,

IT IS HEREBY ORDERED that defendants' motions to dismiss, taken as motions for summary judgment pursuant to Fed.R.Civ.P. 12(b), be and are GRANTED.

IT IS FURTHER ORDERED that defendants have judgment against the plaintiff on the plaintiff's complaint, and that plaintiff's complaint be and is DISMISSED with prejudice at plaintiff's cost.

Dated this 30th day of September, 1980.

/s/ EDWARD L. FILIPPINE
United States District Judge

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

No. 79-1003 C (3)

YELLOW FORWARDING CO. d/b/a YELLOW FREIGHT INTERNATIONAL, *Plaintiff*,

v.

ATLANTIC CONTAINER LINE, DART CONTAINERLINE COMPANY LIMITED, HAPAG-LLOYD AKTIENGESELLSCHAFT, SEA-LAND SERVICE, INC., UNITED STATES LINES, INC., *Defendants*.

MEMORANDUM

(Filed September 30, 1980)

This matter is before the Court on separate motions of two sets of the defendants to dismiss plaintiff's complaint for failure to state a claim upon which relief can be granted. A summary of the allegations of the complaint, which was filed pursuant to 15 U.S.C. §§ 15, is as follows:

> Plaintiff is a surface freight forwarder and a non-vessel operating common carrier (NVOCC). Plaintiff consolidates, for mid-western shippers, less-than-container loads into single containers for shipment to ocean ports and beyond. Plaintiff employs ocean carriers to carry container shipments across the Atlantic.
>
> Defendants are ocean carriers who compete with plaintiff for consolidation business and who compensate plaintiff for consolidation services rendered by plaintiff to defendants. Defendants are, and have been for more than six years, members of the North Atlantic Shipping Conference. For at least the past six years, defendants have "made uniform" their payments to NVOCCs for the latters' consolidation services; these payments have "no reasonable relation to the cost or

market value of the compensated service." The payment rules were filed with the Federal Maritime Commission (Commission) six years ago as part of defendants' ocean tariffs. For the past three years, defendants have attempted to eliminate these payments to plaintiff by repeatedly filing with the Commission proposed agreements to that effect. Such a proposed agreement is currently being considered in Docket No. 77-23, in which the defendants are supporting Agreement 10294 and the plaintiff is protesting the Agreement.

Specifically, defendants (and the International Longshoreman's Association [Union]) have injured plaintiff since 1973 through their agreement on the terms of plaintiff's compensation or denial thereof and their failure to inform the Commission that one purpose of the uniform compensation terms has been to transfer the mid-west consolidation business to the East Coast. One intended effect of the conspiracy is a secondary boycott of plaintiff, which employs no Union members. Plaintiff's consolidation income has been substantially reduced by this uniform payment scheme.

Plaintiff's prayer is for injunctive relief from the uniform payment scheme and for treble damages (including treble the expenses incurred by plaintiff in those proceedings before the Commission in which the defendants have attempted to eliminate the consolidation compensation).

Plaintiff's complaint must be read to some extent to state inconsistent claims, as the plaintiff claims both that it has been damaged by the institution and maintenance of the uniform payment system and that it would be damaged by the elimination thereof. Inconsistent pleadings are, of course, permissible. F.R.Civ.P. 8(e)(2).

It must be noted at the outset that the Shipping Act, 1916, as amended, 46 U.S.C. §§ 801-842, contains a provi-

sion exempting from the Sherman and Clayton Acts any activity lawful under § 15 of the Shipping Act, 46 U.S.C. § 814. The immunity conferred by that section does not extend to the implementation of agreements which have not been approved by the Commission. *See Carnation Co.* v. *Pacific Conference,* 383 U.S. 213 (1966). Defendants' motions to dismiss are premised in large part on their claim that their alleged agreements respecting consolidation allowances have antitrust immunity under § 15.

Defendants have drawn the Court's attention to the decision of the Commission in Docket No. 76-35, *Cancellation of Consolidation Allowance Rule,* 18 S.R.R. 637 (1978). In that decision, plaintiff participated as an intervenor and all five of the instant defendants were respondents. The issues were whether the respondents had taken any unapproved actions with respect to consolidation allowances and, if not, whether such allowances were in the public interest.

The Commission decision in Docket No. 76-35 was essentially that although respondents' consolidation allowance rules did not constitute "routine ratemaking," "Respondents' agreements as approved by [the] Commission permit[ted] them the authority to initiate and maintain a system of payment of consolidation allowances." However, the Commission found that such authority would not extend to the cancellation or elimination of the allowances, and that any attempt at cancellation by respondents would require separate approval under § 15. Finally, the Commission determined that the implementation and maintenance of the consolidation allowances was in the public interest because it fostered the growth of the consolidation business.

Under 28 U.S.C. § 2342(3), the appropriate Court of Appeals had exclusive jurisdiction of any appeal which the plaintiff or any other party to Docket No. 76-35 might have wished to take. It is self-evident that the plaintiff

did not appeal from the Commission's decision because the plaintiff's position in that action was that the maintenance of the consolidation allowances was within the approved authority of the defendants but that cancellation thereof was not. Thus, the instant case resembles *Port of Boston Marine Terminal Ass'n.* v. *Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970), in which the Commission held that a revised tariff which had been filed by the plaintiff conference of maritime terminal operators was within the scope of the conference's approved agreement. One of the shippers from whom payment would be exacted under the revised tariff intervened in the District Court action in which the conference was attempting to collect the tariff. The District Court, after having stayed the action to await the Commission's decision, refused to review the merits of the Commission's decision and rendered judgment against the shippers. The Supreme Court upheld the District Court's decision not to review the merits of the Commission's decision, noting that under § 2342, the Court of Appeals had exclusive jurisdiction to determine the validity of final orders of the Commission. The Court observed that the intervening shipper "had every opportunity to participate before the Commission and then to seek timely review in the Court of Appeals. It chose not to do so. Certainly, from this posture, it cannot force collateral redetermination of the same issue in a different and inappropriate forum." 400 U.S. at 72.

Plaintiff attempts to distinguish *Port of Boston* on the ground that

> Plaintiff is not seeking here a collateral review of any decision made by the [Commission]. As we have shown, our Complaint assumes the correctness of the [Commission's] decision in Docket No. 76-35. All that the [Commission] held or could hold in that proceeding was that the Shipping Act had authorized it to approve collective action by ocean carriers in including

> consolidation allowances in their rate filings. It had before it in that proceeding no claim by any party that the approved agreements had any illegal purpose whatsoever.

Plaintiff's Memorandum in Opposition to Motions to Dismiss (Pl.'s Memorandum) at 18. At another point, plaintiff argues that "the illegal purpose, asserted only by our antitrust Complaint, . . . deprives the [Commission] of jurisdiction to approve the consolidation allowance conspiracy challenged in this suit." Pl.'s Memorandum at 15.

The Court finds both arguments unpersuasive. The statement that defendants' allegedly illegal (anti-competitive) purpose deprived the Commission of jurisdiction is simply inaccurate. The Supreme Court has observed:

> Because § 15 provides that an approved agreement will not be subject to the antitrust laws, it is apparent that Congress assigned to the Commission, not to the courts, the task of initially determining which anticompetitive restraints are to be approved and which are to be disapproved under the general statutory guidelines. It is equally apparent that as a substantive matter, Congress anticipated that various anticompetitive restraints, forbidden by the antitrust laws in other contexts, would be acceptable in the shipping industry.
>
> That the Commission is the public arbiter of competition in the shipping industry is reflected in prior holdings that in reaching its decision under § 15 the Commission *must* "consider the antitrust implications of an agreement before approving it," *FMC* v. *Seatrain Lines, Inc.*, 411 U.S. 726, 739 (1973), and should approve an anticompetitive agreement only if it is " 'required by a serious transportation need, necessary to secure important public benefits or in furtherance of a valid regulatory purpose of the Shipping Act.' " *FMC* v. *Svenska Amerika Linien*, 390 U.S. 238, 243

(1968). The Commission, nevertheless, may approve agreements "even though they are violative of the antitrust laws. . . ." *Seatrain, supra,* at 728.

FMC v. *Pacific Maritime Ass'n.,* 435 U.S. 40, 53-54 (1978).

The Court also disagrees with plaintiff's first argument because the Commission's decision in Docket No. 76-35, in holding that the consolidation allowances at issue were within the scope of defendants' approved agreements and were in the public interest, necessarily conferred antitrust immunity on the defendants pursuant to § 15. Although the consolidation allowances themselves were not filed pursuant to § 15, the Commission in effect held that they were lawful under that section because they were instituted pursuant to an approved agreement and therefore did not require the Commission's prior, separate approval. That decision, which involved, in the Commission's phrase, "a consideration of external circumstances" and of affidavits of fact, now has collateral estoppel effect, and its correctness cannot be challenged by plaintiff in this action. *United States v. Utah Construction Co.,* 384 U.S. 394 (1966).

The fact that the Commission has held that the allowances at issue did not require separate filing under § 15 distinguishes this case from *Carnation Co.* v. *Pacific Conference,* 383 U.S. 213 (1966). In that case the Commission held that the defendants in the antitrust action had implemented an unapproved agreement which was not covered by an earlier, approved agreement, and the Supreme Court held that the dismissal of plaintiff's treble-damage action was error. The Supreme Court observed that "[a]lthough the Commission can approve prospective operations under agreements which have been implemented without approval, . . . the Commission has no power to validate pre-approval implementation of such agreements." 383 U.S. at 222. The Supreme Court remanded to the District Court with directions to stay the action pending the final outcome

of the appeal of the Commission's decision. That action provides further support for this Court's view that a retroactive decision by the Commission, or a decision on appeal therefrom, that a certain course of concerted action had not required independent filing under § 15, has conclusive weight in an antitrust action based on that course of action.

Plaintiff argues that the principles of *Utah Construction Co., supra,* do not support the proposition that the Commission's decision must be accorded collateral estoppel effect because that case involved only the effect to be given to administrative decisions of "disputed issues of fact." Plaintiff further claims that "[n]o issues were raised as to the Defendants' authority to take concerted action with respect to consolidation allowances in Docket 76-35. . . . All parties agree and always have agreed that the Shipping Act grants such power to the Defendants." Plaintiff's Memorandum at 17.

The Court finds the latter argument to be slightly disingenuous. Of course there was no issue in Docket No. 76-35 as to defendants' theoretical ability to take concerted action, once approved by the Commission. There *was* an issue, however, as to whether defendants' actions with respect to consolidation allowances had been approved. Plaintiff implies that the Commission's decision on this issue was not a factual determination. The Supreme Court indicated otherwise in *Carnation Co., supra.* There the Court explained its earlier holding that the Commission had primary jurisdiction to determine whether certain conduct alleged to be unlawful in an antitrust action in fact constituted the implementation of unapproved agreements:

> "This Court decided that the danger of such a conflict could best be avoided by holding that one tribunal or the other has the exclusive right to make the initial factual determination. Since the Commission has specialized knowledge of the industry, the Court concluded that such primary jurisdiction should be vested in the

> Commission and accordingly instructed the District Court to refrain from acting until the Commission had ascertained and interpreted the circumstances underlying the legal issues."

383 U.S. at 220-21. The Court's characterization of the process as a factual determination is in fact illustrated by the Commission's approach in Docket No. 76-35.

There can be no doubt that plaintiff had a full and fair opportunity to litigate the issues in Docket No. 76-35, for in fact the plaintiff's position prevailed. Accordingly, insofar as plaintiff seeks damages and injunctive relief from defendants' institution and maintenance of the uniform consolidation allowances at issue, defendants must have judgment because plaintiff is estopped from attacking the allowances' legality, and the defendants' concomitant antitrust immunity, under § 15:

Insofar as plaintiff's complaint is directed to the current and past proceedings before the Commission in which the defendants are attempting to eliminate the consolidation allowances, the Court finds that the complaint falls far short of the level required to invoke the "sham" exception to the *Noerr-Pennington* doctrine, as developed in *California Transport v. Trucking Unlimited*, 404 U.S. 508 (1972). The Eighth Circuit has analyzed the *Noerr-Pennington* doctrine as follows:

> *Noerr* and *Pennington* read together, have been correctly summarized . . . as holding that "joint efforts to influence government action are outside the scope of the Sherman Act, even if the combination is formed for the sole purpose of eliminating competitors."
>
> . . . .
>
> [In *California Transport v. Trucking Unlimited, supra*] the essential element of the sham exception, whether employed in an adjudicative or non-adjudica-

> tive setting [was disclosed], namely, an absence of a genuine effort to influence government but, rather, an intent to injure a competitor directly.
>
> . . . .
>
> It matters not that the sole purpose alleged to underlie the attempt to influence governmental action was to hamper a competitor's business activities.

Mark Aero, Inc. v. Trans World Airlines, Inc., 580 F.2d 288, 294-96 (8th Cir. 1978) (footnotes omitted). In *Mark Aero*, the critical allegations were that the defendants had "prevented plaintiff from enjoying free and meaningful access" to certain adjudicatory bodies by, among other things, engaging in a publicity campaign and resorting to economic coercion. Despite the plaintiff's unmistakable attempt to invoke *California Transport's* definition of the sham exception, the Eighth Circuit held that the complaint should have been dismissed.

In the instant case, plaintiff's allegation that the defendants have "repeatedly fil[ed]" proposed uniform rules which would eliminate the consolidation allowances, does not even suggest that the defendants' true intent is not to cause the Commission to approve these proposals. There is no allegation that the plaintiff's access to any of those proceedings has been barred or impeded in any way. In fact, plaintiff alleges that it is currently a party to Docket No. 77-23. Accordingly, to the extent that plaintiff's complaint is directed towards the defendants' past and current efforts to cause the Commission to approve the elimination of the allowances, it must be dismissed.

Finally, the Court observes that plaintiff's arguments that the Commission should not be allowed to usurp the functions of the I.C.C. and the N.L.R.B. is, ultimately, an argument that § 15 should be repealed. Since the Com-

mission's authority under § 15 has not been extinguished, however, this Court must defer to that authority. *See FMC v. Pacific Maritime Ass'n, supra.*

Dated this 30th day of September, 1980.

/s/ Edward L. Filippine
United States District Judge

Opposition

Supreme Court, U.S.
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No. 81-1695

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OCTOBER TERM, 1981

YELLOW FORWARDING COMPANY,
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v.

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Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

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COUNTERSTATEMENT OF THE QUESTION PRESENTED

Whether a final order of the Federal Maritime Commission, determining (1) that certain concerted actions by ocean carriers were taken pursuant to agreements approved under Section 15 of the Shipping Act, 1916 (and thus immunized from the antitrust laws) and (2) that such agreements continue to be in the public interest, may now be collaterally attacked in an antitrust action against such ocean carriers, on the grounds that the concerted actions nonetheless carried out an alleged illegal purpose, by a district court plaintiff who not only had the opportunity to participate in the Commission proceeding but was an active litigant urging the very result reached by the Commission.*

---

* The major corporate shareholders or parent companies of respondents are as follows: Hapag-Lloyd Aktiengesellschaft: Deutsche Bank AG, Dresdner Bank AG, and Veritas Vermogensverwaltungsgesellschaft mbH; Atlantic Container Line: Compagnie Generale Maritime, Cunard S.S. Co., Ltd., Intercontinental Transport (ICT), B.V., AB Svenska Amerika Linien, Rederiaktiebolaget Transatlantic, Wallenius rederierna AB Soya; Dart Containerline Company Limited: Compagnie Maritime Belge, S.A., Centennial Shipping Co., and Consolidated Container Service Company, Ltd; United States Lines, Inc.: First Colony Farms, Inc. and McLean Securities, Inc; Sea-Land Service, Inc.: R.J. Reynolds Industries, Inc. Dart Containerline Company Limited has the following subsidiaries and affiliates: D.C. Holdings Ltd., Dart Containerline Ltd., and Global Terminal & Container Services, Inc.

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---

BRIEF FOR RESPONDENTS IN OPPOSITION

STATEMENT

1. The respondent ocean carriers are engaged in ocean transportation in the foreign commerce of the United States and thus are subject to the jurisdiction of the Federal Maritime Commission. Under Section 15 of the Shipping Act, 1916, 46 U.S.C. §814, the ocean carriers have established conferences in several geographic areas. Such conferences are organized under agreements filed with and approved by the Federal Maritime Commission ("Commission") which authorize the member carriers jointly to establish the rates, charges, and allowances to be observed by them in the particular geographic area covered by each such conference. Section 15 of the Shipping Act provides, in pertinent part, that "every agreement,

modification, or cancellation lawful under this section . . . shall be excepted from the provisions of [the antitrust laws]." 46 U.S.C. §814.

For a number of years the respondent ocean carriers, under authority of their conference agreements approved by the Commission, have maintained uniform consolidation allowances in their filed conference tariffs. Such allowances, which consist of discounts from an ocean carrier's normal rates, are paid to non-vessel operating common carriers ("NVOs")[1] who tender for shipment fully loaded containers holding a specified mixture of cargo.

In December of 1975, several conferences to which the respondent ocean carriers belong filed tariff provisions with the Federal Maritime Commission which would have suspended their rules providing for payment of consolidation allowances. Petitioner Yellow Forwarding Company ("Yellow"), as well as several other NVO consolidators, protested the suspension. In response, the Commission ordered the suspension investigated in its Docket No. 76-35. Pet. App. 4a. Yellow participated in that proceeding as an intervenor. The Commission ordered the respondent conferences to show cause, *inter alia:*

> [W]hy the Commission should not find that any concerted action of Respondents with regard to consolidation allowances are actions which implement unfiled, unapproved agreements in violation of section 15.
>
> * * *
>
> [W]hy, even if the concerted actions are pursuant to agreements approved by the Commission under section 15 of the Shipping Act, 1916, the Commission should not find such agreements contrary to the public interest which should be disapproved or modified.

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[1] NVOs are persons who hold themselves out to transport goods by water but do not own or operate vessels. They are required to file tariffs with the FMC covering their services.

Pet. App. 4a. The Commission proposed to take evidence in the form of affidavits of fact and memoranda of law, "unless any party considered an evidentiary hearing to be required and requested one be held." *Cancellation of Consolidation Allowance Rule,* 20 F.M.C. 858, 860 (1978). Yellow made no request for an evidentiary hearing. The sole request, which was made by the involved conferences, was denied. *Id.* The Commission accepted and relied upon evidence produced in affidavits as the record in the proceeding. *Id.*

Before the Commission, Yellow urged the continued maintenance of the consolidation allowances as they existed prior to the proposed suspension. Yellow contended that:

> [I]nstitution and maintenance of the allowance system are actions within the approved authority of Respondents which continue to be justified and in the public interest by fulfilling a serious transportation need.

Id. at 864. Other parties opposed Yellow's position and urged that the carriers were not authorized to establish and maintain the allowances. *Id.* at 860-65. No party, including Yellow, took the position that the maintenance of uniform consolidation allowances implemented any agreement among ocean carriers and a labor union. *Id.* With respect to the effect of the uniform system of consolidation allowances, Yellow maintained that:

> [I]t is uncontested that the consolidation allowance system supports a competitive industry which provides a valuable service to carriers and shippers alike. The system of allowance payments is universally seen as a means of attracting cargo which might not otherwise move, and as providing a sound rate basis for doing so.

Id. at 864.

The Commission served its Report on July 12, 1978 and resolved the issues raised in its Order to Show Cause in Docket No. 76-35 by completely adopting the position espoused by Yellow, concluding:

> On the basis of the foregoing it is found that the approved agreements of Respondents authorize them to act concertedly to implement and maintain a system of payment of consolidation allowances. Further, it is found that the maintenance of this system is in the public interest and continues to be justified.

Id. at 867-68.

2. Approximately one year after the Commission's decision in Docket No. 76-35, Yellow filed in the Eastern District of Missouri the civil action which underlies the present Petition. In its complaint Yellow alleged that the concerted action of the ocean carriers in maintaining the consolidation allowances was for the purpose of carrying out a conspiracy among the ocean carriers and the International Longshoremen's Association ("Union"). Pet. Supp. App. 3a.[2] Yellow did not allege fraudulent concealment of the alleged purpose nor has it ever contended in this case that the facts alleged in the complaint were unknown to it when it participated in the proceeding before the Commission.

The Court of Appeals affirmed the dismissal of the action by the District Court on the grounds that Yellow may not collaterally attack a final order of the Federal Maritime Commission by filing an antitrust action in the District Court. In so holding, the Court of Appeals rejected Yellow's claim that it could not have litigated in Docket No. 76-35 the issue of whether the allowances resulted from an agreement among the ocean carriers and the Union. The Court of Appeals held that:

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[2] In addition to alleging a conspiracy to establish the allowances, the complaint also alleged a conspiracy to seek to eliminate the allowances through repeated filings with the Commission to accomplish that purpose. The District Court's dismissal of the complaint insofar as it made such allegations was on the basis of this Court's decisions in *United Mine Workers v. Pennington*, 381 U.S. 657 (1965) and *Eastern R.R. Presidents Conference v. Noerr Motor Freight*, 365 U.S. 127 (1961). Yellow did not question that aspect of the District Court's decision before the Court of Appeals. Pet. App. 6a n.9.

> [Yellow's] allegations as to the alleged purpose and intended effect of the agreement among the [ocean carriers] and the union as to the terms on which [the ocean carriers] would compensate it were clearly within the scope of the Commission's inquiry in Docket No. 76-35.

Pet. App. 9a. The Court of Appeals further held that Yellow, since it could have raised its conspiracy allegations before the Commission in Docket No. 76-35 but chose not to do so, cannot now force collateral redetermination of the legality of the system of consolidation allowances in a different forum. Pet. App. 9a, *citing Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970).

REASONS FOR DENYING THE WRIT

The Petition should be denied because it presents no issue worthy of this Court's review. After successfully arguing to the Commission that the system of consolidation allowances was in the public interest, Yellow now claims that those allowances carried out an "illegal purpose." The case is controlled, *a fortiori,* by this Court's holding in *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic,* 400 U.S. 62 (1970), that a final Commission decision after the expiration of the time for direct review may not be challenged in a collateral action.

1. The Petition fails to set forth, as required by Rules 17 and 21.1(j) of the Rules of this Court, any reason why a writ of certiorari should be granted. In fact, this case presents no conflict among the circuits, no issue of general or continuing importance, nor any other reason for this Court's review. The case is narrowly confined to an easily answered question of collateral review which has already been resolved by this Court and correctly decided in this case by the Court of Appeals.

The controlling question in this case is whether Yellow's active participation in Docket No. 76-35, where it advocated the findings (1) that the ocean carriers' institution and maintenance of consolidation allowances was within the scope of their approved agreements and (2) that such agreements continue to be in the public interest, precludes a collateral attack by Yellow on the Commission's decision through an antitrust action in the District Court. That question was definitively resolved by this Court in *Port of Boston Marine Terminal Ass'n. v. Rederiaktiebolaget Transatlantic*, 400 U.S. 62 (1970). There is no basis presented for reexamining that question herein.

In *Port of Boston*, the petitioner shipping company argued that it was not bound by the Federal Maritime Commission's finding that a marine terminal association acted properly in amending its tariff without prior Commission approval because the petitioner had not been a formal party to the proceedings before the Commission and could not be bound by the failure of the formal party to seek timely review under the Hobbs Act, 28 U.S.C. §2341 *et seq.* The First Circuit found that the shipping company had a right to collateral review and overruled the Commission's decision on the merits. However, this Court held that since the time for direct review of the Commission's Order in the Court of Appeals had expired, and the shipping company had every opportunity to participate in the Commission proceedings and to seek timely review, the Commission's decision was final and binding on the shipping company and the merits of the decision were not subject to review in an action filed in the District Court.

This case presents even more compelling facts requiring application of the *Port of Boston* principle. Here a previously successful litigant seeks collateral review and reversal of the position which it formerly espoused.[3] Whether a party may secure reversal in the District Court of the result which it urged

[3] Unlike Yellow, the losing petitioner in *Port of Boston* was not even a party to the proceeding before the Commission and, of course, was not the successful litigant in that proceeding.

and won before an administrative agency hardly presents an issue of continuing or general significance or a case "involving principles the settlement of which is of importance to the public as distinguished from that of the parties . . . ." *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923).

2. The Court of Appeals correctly applied *Port of Boston* in this case. Any allegation that the consolidation allowances were the result of a conspiracy between ocean carriers and the Union could have been heard by the Commission when it considered the lawfulness of the consolidation allowances in Docket No. 76-35. The issues raised in the Commission's order to show cause in Docket No. 76-35 specifically included the question of whether "consolidation allowances are actions which implement unfiled, unapproved agreements in violation of section 15" and whether, even if the concerted actions are pursuant to agreements approved by the Commission under Section 15, they should not be found "contrary to the public interest" and cancelled or modified. Pet. App. 4a, 8a. Yellow thus had every opportunity to present in that proceeding the allegations on which it now relies in order to defeat the Commission's approval of those consolidation allowances but chose not to do so.

The Court of Appeals did not hold, as Yellow implies (Pet. 12), that Commission approval of a conference agreement immunizes conduct not considered by the Commission. Thus, the question here presented is not, as Yellow asserts (Pet. i), whether the Federal Maritime Commission could immunize an antitrust conspiracy that was never presented to or considered by the Commission. The Court of Appeals held only that a determination that the system of consolidation allowances was established pursuant to an approved conference agreement and that its continuation was in the public interest had been made in Docket No. 76-35, to which Yellow was a party and from which no judicial review was sought, and that Yellow is barred

from now alleging that the allowances instead carried out an illegal purpose pursuant to a "wider conspiracy."[4]

The Court of Appeals' decision does not, therefore, "misconstrue" this Court's decision in *Carnation Company v. Pacific Westbound Conference*, 383 U.S. 213 (1966), as alleged by Yellow. Pet. 11. *Carnation* required the Commission to determine whether the alleged conduct was pursuant to an agreement approved by the Commission and thus immune from the antitrust laws. Similarly, the Court of Appeals in this case relied upon the Commission's exercise of its jurisdiction in Docket No. 76-35 where the question of whether the consolidation allowances were pursuant to an unapproved agreement was resolved with Yellow's participation and in accord with its position that the maintenance of a system of allowances was authorized by and pursuant to the carriers' approved conference agreements.

Yellow argues that it could not have raised before the Commission any antitrust allegations involving an alleged Union/carrier agreement because no such agreement was before the Commission for consideration. Pet. 12-13. This attempt to circumvent *Port of Boston* totally misses the mark because the issue of whether the consolidation allowances implemented any unapproved agreements was clearly set for decision in the Commission's order of investigation in Docket No. 76-35. Yellow not only failed to raise any allegation of an unapproved conspiratorial agreement but affirmatively argued that the system of consolidation allowances was implemented under authority of approved conference agreements. *Cancellation of Consolidation Allowances, supra*, 20 F.M.C. at 864.

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[4] Neither the Court of Appeals nor respondents has relied on any notion that the Commission may "immunize unconsciously." *See* Pet. 15, citing *Interpool Ltd. v. Federal Maritime Commission*, 663 F.2d 142 (D.C. Cir. 1980). Yellow's antitrust action is barred because of Yellow's active participation in the Commission proceeding in support of the position that the consolidation allowances are and should be immunized. Moreover, in *Interpool*, the Court of Appeals could question whether the Commission had immunized unconsciously and remand for consideration of anticompetitive effects only because the case was under direct review pursuant to the Hobbs Act, 28 U.S.C. § 2341 *et seq.* Yellow sought no such direct review.

Moreover, Yellow's present allegation that an "illegal purpose" was carried out through the concerted action of maintaining a system of consolidation allowances would have been directly responsive to the other issue posed by the Commission of whether, even if the conference agreements approved by the Commission under section 15 authorized the system of consolidation allowances, the Commission should find such agreements to be contrary to the public interest and disapprove or modify such agreements. Yellow plainly had the opportunity to allege, and prove if it could, the existence of a "wider conspiracy" to carry out an illegal purpose in order to defeat the claim that the continued maintenance of the system of consolidation allowances is in the public interest.[5] The evaluation of the public interest, under Section 15, includes consideration of the antitrust policy and laws of the United States. *Federal Maritime Commission v. Pacific Maritime Ass'n.*, 435 U.S. 40, 53 (1978); *Federal Maritime Commission v. Seatrain Lines, Inc.*, 411 U.S. 726, 739 (1973); *Federal Maritime Commission v. Aktiebolaget Svenska Amerika Linien*, 390 U.S. 238, 245-46 (1968). Yellow's failure to raise its allegations of antitrust violations in response to the public interest question precludes its collateral attack on the Commission's decision.

Yellow's further contention that the purported basis of the complaint—"lawful conduct directed toward an illegal end" (Pet. 14)—is supported by this Court's decision in *Allen Bradley Co. v. Electrical Workers Union*, 325 U.S. 797 (1945), also misses the point. As the Court of Appeals correctly found, *Allen Bradley* involved no regulatory statute which granted

[5] Yellow's contention that the Commission could not hear evidence in Docket No. 76-35 and could not, therefore, have considered the conspiracy alleged in Yellow's antitrust complaint simply misstates the record. The Commission did hear evidence in Docket No. 76-35 through the submission of affidavits of fact. *Cancellation of Consolidation Allowance Rule, supra*, 20 F.M.C. at 863-865. Moreover, the Commission specifically entertained requests for an evidentiary hearing, but Yellow made no such request. *Id.* at 860.

immunity from the antitrust laws for the conduct involved. Moreover, that case involved no collateral attack of a prior determination that the lawful conduct was pursuant to an agreement immunized from the antitrust laws and in the public interest. Yellow, in contrast, had its "day in court" and chose not to complain of an "illegal end" which it now alleges but chose instead to argue that the system of consolidation allowances is in the public interest and in accord with approved agreements. It may not now seek to overturn the result which it obtained before the Commission.

CONCLUSION

The petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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